IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.982 OF 1998

Shri Sunderji Mulji Shah.& Anr. ..Petitioners.

V/s.

Jyoti Structures Ltd. ..Respondent.

Mr.Sanjay Jain a/w. Kalpesh Mansi for petitioners.

Mr. Anand Shah i/b. Wadia Gandhy & Co. for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : NOVEMBER 29, 2007.

P.C. :

1. Heard Counsel for the parties. Perused the pleadings and documents on record.

2. The Petitioners' claim is founded on the goods sold, delivered and supplied to the Respondent-company from time to time in terms of Purchase Order dated 28th August, 1995. According to the Petitioners, the last delivery of the goods was made in September, 1996, which was in accord with the Purchase Order and the subsequent communication exchanged between the parties. It is the petitioners' case that the Respondent-company never raised dispute about quantity, quality or the price of the goods supplied by the Petitioners. However,

the Respondent Company unilaterally deducted certain amount from the Bills submitted by the Petitioner-company from time to time on the assertion that the goods supplied by the Petitioners were not in time and for which reason, the Respondent company was entitled for liquidated damages under clause 11 of the Purchase Order. Petitioners have relied on the correspondence exchanged between parties, which according to them indicates that the Respondent-company accepted the goods delivered by the Petitioners from time to time. The Petitioners' case is that the delay was attributable to the Respondent-company, as the Respondent released the advance for the first time on 29th February, 1996. According to the Petitioners, therefore, there was no just reason for the Respondent-company for withholding any amount out of the bills submitted by the Petitioners from time to time. For that reason, the Petitioners eventually issued statutory notice and called upon the Respondent to pay the balance outstanding amount of Rs.6,02,995/- alongwith the interest at the rate of 24% per annum. Inspite of the statutory notice, the Respondent did not pay the amount to the Petitioners, which has necessitated the Petitioners to approach this Court by way of present Petition.

3. The Respondent on the other hand, would contend that the Respondent was justified in deducting the stated amounts from the bills submitted from time to time in view of clause 11 of the Purchase Order, which provided for specified liquidated damages, as also in clause 2 towards shipment charges and incidental expenses. According to the Respondent, the Respondent had put the Petitioners to notice about the consequences for delayed delivery as per the Purchase Order. The Respondent-company asserts that they have had no option, but to accept delayed delivery made by the Petitioners, so as to complete contractual obligations between the Respondent-company and EELPA. The Respondent would then contend that inspite of deduction made by the Respondent in relation to the subject invoices, the business relation between the Petitioners and the Respondent was continued even after institution of the present Petition. In that, parties have done business to the extent of almost Rs.2 Crores, which clearly indicates that the Petitioners had full faith in the financial capability of the Respondent. According to the Respondent, they have raised bonafide dispute and it is not a case of neglect to pay the outstanding

amount as such. Besides, the Respondent is commercially solvent to meet the obligations of paying the amount, even if the same was to be ordered by the Civil Court in the suit pending between the parties. The Respondent would also contend that in fact, the liability of the Respondent would arise only if the matter was adjudicated before the Arbitrator in view of the Arbitration agreement between the parties in terms of clause 15(c) of the Purchase Order.

4. Having considered rival submissions and going through the material on record, I have no hesitation in taking the view that the Petitioners have established that goods were sold, delivered and supplied to the Respondent-Company. There is also no doubt that the goods were supplied after the time specified in the Purchase Order. It is not necessary for this Court to burden the Judgment with the controversy, as to whether the Respondent had agreed for delayed delivery of the goods or extended the time, which was essence of the contract as per the Purchase Order. In my opinion, the Petitioners have justly relied on the provisions of Section 55 of the Indian Contract Act, 1872 to contend that there was no material on record to suggest that the Respondent

when accepted the goods delivered by the Petitioners belatedly, had done so by registering their protest and reserving their rights to avail of the remedy under clause 11 of the Purchase Order. Indeed, the Counsel for the Respondent pointed out that such liberty was reserved by the Respondent, as can be discerned from the letters amongst others letters dated March 25, 1996 at page 84 and dated 24th June, 1996 at page 85. The contents of the letter dated 25th March, 1996 reads thus:

> "We are still awaiting response to point-D of our fax message No.J-228/733 dated 08.03.1996. As per clause No.9 (Delivery) of purchased order, it may be noted that 100% deliveries are required at port Assab by 31.03.1996, failing which we shall be forced to deduct liquidated damages as per clause No.11.
>
> Please therefore take immediate necessary action in shipping 100% material by end March,96 as per the agreed terms & conditions."

The contents of the letter dated 24th June, 1996 reads thus:

> "You are please aware of following facts:
>
> A)Order completion Date : 30.3.96
>
> B)Quantity Delivered by 30.3.96 : Nil.
>
> C)Balance quantity remaining as on 21.6.96 :289.875kms.
>
> We are not able to understand the reason for

> delaying the order indefinitely especially when timely clearance was given.
>
> You will also appreciate that we have helped you at each and every stage and have also released your payments in time. Clients are extremely disappointed at our performance and in addition have also started deduction of penalty from our invoices.
>
> In view of this, we request that immediate necessary steps be taken to supply the balance material without any further loss of time, failing which action will be taken as per clause No.11 of the Order.
>
> Please confirm urgently per return fax what remedial measures are being adopted."

5. In so far as the letter dated 25th March, 1996 is concerned, it mentions that 100% delivery was required as per clause 9 of the Purchase Order before 31st March, 1996, failing which the Respondent would be forced to deduct liquidated damage as per clause 11. As mentioned earlier, the Respondent released the payment for the first time on 29th February, 1996. It is only after release of such payment, the Petitioners were expected to supply the goods in terms of the Purchase Order. The Purchase Order provides for the delivery schedule. As the Respondent delayed the release of advance payment till 29th February, 1996, naturally the Petitioners could supply the goods only after 31st March, 1996. The fact remains that the Respondent by their letter

dated 24th June, 2006 called upon the Petitioners to supply balance material without any further loss of time and subsequent letter dated 20th September, 1996 at page 96-A that the container should be stuffed by 25th September, 1996, failing which the container detection charges upto the time it is stuffed shall be debited to the account of the Petitioners. From the tenor of the letters, it is obvious that the Respondent on their own extended the time limit for delivery. For the purpose of attracting section 55 of the Contract Act enabling the Respondent to deduct liquidated damages, what is required to be pointed out, is that, the Respondent accepted deliveries of the goods sent by the Petitioners beyond time and contemporaneously registered their protest for such delayed delivery of goods, for which reason reserved liberty to claim damages in terms of clause 11. The argument that the Petitioner was directly delivering goods to EELPA makes no difference to the legal obligation arising from Section 55 of the Contract Act. The documents, which are pointed out by the Respondent to justify their stand do not fulfil the requirement of section 55. On the other hand, the letter dated 24th June, 2006, on which emphasis was placed would indicate that the Petitioners were informed to supply balance material without further

loss of time, failing which action will be taken as per clause 11 of the Order. That presupposes that if the Petitioners were to supply balance material without further loss of time. The Respondents were not to invoke clause 11 of the Purchase Order. The Petitioners did supply the goods as per the said understanding. On delivery of said goods which was accepted, the Respondent did not cause to accept that delivery under protest with liberty to invoke liquidated damages under clause 11 of the Purchase Order. In absence thereof, the Respondents became liable to pay the value of the goods without reserving right to withhold any amount towards liquidated damages, in terms of section 55.

6. Be that as it may, taking over all view of the matter, I am in agreement with the stand taken on behalf of the Petitioners that the Respondent having allowed the petitioners to supply goods from time to time, even beyond the specified period under the Purchase Order; and did not cause to accept the delivery of such goods under protest and reserving right to claim liquidated damages in terms of clause 11 of the Purchase Order on the date when the delivery of the goods was accepted, it was not open to the Respondent in law to ask for liquidated

damages, muchless, unilaterally deducted that amount from the invoices.

7. In the peculiar facts of the present case, instead of admitting the Company Petition, I propose to pass conditional order, to which the Respondent has consented to abide by such condition to the effect that the Respondent shall deposit sum of Rs.6 Lakhs in this Court within four weeks from today. The amount so deposited shall be transferred to the suit account being Civil Suit No.1316 of 2000, which is pending in this Court between the parties. The amount shall be invested in Fixed deposit scheme in any Nationalised Bank, which will be subject to the orders, to be passed in the pending suit.

8. It is made clear that the deposit made by the Respondent will be without prejudice to the rights and all the contention available in the pending suit-including to agitate that there is arbitration agreement between parties in relation to the disputed property before this Court or pending in the suit.

9. In the event, the Respondent fails to deposit sum of Rs.6 Lakhs within the specified time, this Petition would stand admitted and the Petitioner will

be free to issue advertisement of admission of petition after expiry of four weeks from today.

10. After four weeks from today, in case the Petition stands admitted as aforesaid, the same is made returnable on 21st February, 2008 and is directed to be advertised as noted below.

11. The Petitioner shall advertise the Petition in two local newspapers, namely, "Free Press Journal", "Navshakti" and in the Maharashtra Government Gazette. The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary & Senior Master towards the publication charges, after four weeks from today and within three weeks from the date of prospective admission of the Company Petition in view of this conditional order, with intimation to the Company Registrar, failing which the Petition shall stand dismissed for non-prosecution.

(A.M.KHANWILKAR,J)